IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1361 of 1986

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAROJ GARMENTS

Versus

BABULAL RAMCHANDRA

Appearance:

MR MB GANDHI for Petitioner

MR MR SV RAJU for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 05/05/2000

ORAL JUDGEMENT

1. This is a revision application under section 29(2) of the Bombay Rent Act, at the instance of the tenant-original defendant no.1. The respondent no.1 herein is the original landlord-plaintiff, the second respondent is the defendant no.2, who is alleged to be the sub-tenant of the original tenant defendant no.1.

2. The landlord had filed a suit in the Rent Court for a decree of eviction against the tenant on four

grounds viz. that the tenant is in arrears of rent for more than six months, that the landlord requires the suit premises for personal and bonafide requirements, that the tenant had illegally sub-let the premises to the second defendant, and that the tenant had acquired other suitable accommodation.

3. The trial court, after appreciating the evidence on record dismissed the suit of the landlord on all the four grounds.

4. The landlord, therefore, preferred an appeal. In the said appeal the question of arrears of rent and also the question of tenant having acquired other suitable accommodation were not urged, and therefore not considered by the lower appellate court.

5. The ground of personal bonafide requirement of the landlord was urged in appeal, but the lower appellate court confirmed the finding of the trial court on this issue.

6. However, the lower appellate court accepted the contention of the landlord and allowed the appeal on the sole ground that the tenant had illegally sub-let the premises let out to the tenant. Hence the present revision application by the original tenant-defendant no.1.

7. I have heard the learned counsel for the original tenant and learned counsel for the landlord at length, and I have perused such oral and documentary evidence on record to which my attention has been drawn. On a careful perusal of the impugned judgement and evidence on record I am satisfied that the findings recorded by the lower appellate court on the question of illegal sub-letting on the part of the defendant-tenant, are based on firstly no evidence at all, and are also based upon the gross mis-interpretation of the pleadings of the parties and the consequential evidence on record, to the extent that such findings amount to a perversity in law. In my opinion, therefore, the judgement and order of the lower appellate court requires to be quashed and set aside for the reasons discussed hereinafter.

8. Learned counsel for the landlord seeks to support the impugned judgement and order of the lower appellate court on different grounds, which grounds appear to have been developed only before this court and have not in the same terms been urged before the lower appellate court. Be that as it may, in substance the contention of the

learned counsel for the landlord is that a partnership firm is not a legal entity, and is incapable of holding assets (except in the limited sense for taxation purposes), and that therefore a tenancy in the name of a partnership firm is for all practical purposes and also in law, a joint tenancy effected in respect of the then partners. It is contended that on changes being effected in the constitution of the partnership firm, when the parties who were partners on the date when the tenancy was effected, have left the firm, it brings to an end the joint tenancy in favour of the then partners, and that the successor firm acting through the fresh partners, should be deemed to have in law effected an illegal sub-tenancy in favour of the new partners. In my opinion, this somewhat nebulous submission is based on hypothetical considerations, does not meet the test of the pleadings of the parties and the evidence on record, nor is justified in law.

9. The facts which are not in dispute and/or are not disputable from the evidence of record are to the effect that the tenancy was effected in the name of the partnership firm, which on the relevant date had four partners, that by passage of time there were successive changes in the constitution of the firm whereby some of the then partners left and some new partners entered into the firm. Ultimately a stage was reached when all the partners who were partners when the tenancy was created had left the firm, and were replaced by fresh partners, who were not the partners when the tenancy was created. It is pertinent to note that the second defendant who is the alleged sub-tenant is one of the fresh partners who was not a partner on the date when the tenancy was created.

10. It is pertinent to recall that the landlord has sued the tenant for creating an unlawful sub-tenancy and the cause of action in this context would accrue under section 13(1)(e) of the Bombay Rent Act, which reads as under:

"13. (1) Notwithstanding anything contained in this Act, but subject to the provisions of section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

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(e) that the tenant has, since the coming into operation of thie Act unlawfully sublet the whole

or part of the premises or assigned or trasnsferred in any other manner his interest therein; or

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11. It is by now a well settled principle, which does not require any detailed discussion, that for the purpose of justifying a decree under this clause, the landlord must first plead and then prove that there has been actual and physical transfer of possession in favour of a specific person or legal entity. It is not sufficient merely to allege that merely by operation of law the interest in the suit property has been transferred or assigned, either to a vague entity or to a partnership firm, which is not a legal entity. The case law on the subject requires that the alleged sub-tenant must be identified, and the landlord must establish that the original tenant has by way of creating such illegal sub-tenancy, transferred actual and physical possession of the leased premises, and this transfer is in favour of the alleged sub-tenant.

12. On the facts of the case it is found that the second defendant has been named only as the alleged sub-tenant, but even a careful perusal of the pleadings fails to disclose any averment that the said second defendant was placed in exclusive possession of the leased premises by the tenant firm. Apart from the total absence of pleadings in this regard, there is not an iota of evidence on record that the second defendant, the alleged sub-tenant is in exclusive possession of the leased premises. Furthermore, although it is alleged that the reconstituted firm is still doing business in the leased premises, there is not an iota of an averment, insinuation or evidence that it is the second defendant who is exclusively attending to the business of the reconstituted firm in the leased premises. It is, therefore, obvious that there is neither an averment nor evidence on two vital aspects that (1) there was transfer of exclusive possession by the firm which was the tenant, and (2) such transfer by the tenant firm was in favour of the second defendant who is alleged to be the illegal sub-tenant.

13. The net fact which emerges from this situation is that the entire case of the landlord is built upon a legal hypothesis which according to him does not require actual and physical transfer of the leased premises in favour of any specific person, but is based only upon the contention that a reconstituted firm, which does not have

any of the original partners as on the date of the lease, must by itself in law amount to an illegal sub-tenancy. In support of this proposition learned counsel for the landlord has sought a number of decisions including decisions of the Supreme Court. Before I discuss the decisions relied upon by the learned counsel for the landlord I am required to note the observations of the Supreme Court, as to how and in what manner decisions of the Supreme Court are to be read, interpreted and applied.

14. The Supreme Court in the case of Commissioner of Income-Tax Vs. Sun Engineering Works, reported at 1992(4) SCC page 363, following its earlier decision in the case of Madhavrao Scindia, reported at 1971(1) SCC page 85, had occasion to observe in para 39 of the judgement that the decision of the Supreme Court must be read (and applied) in the context of the questions raised and considered in that decision. This view expressed in the said decision was further fortified and to some extent enlarged by the observations made in the subsequent decision of the Supreme Court in the case of State of Punjab Vs. Baldevsing, reported at 14(3) GLR 2483, wherein in para 43 of the said decision the Supreme Court had occasion to observe to the effect that a decision is an authority only for what it decides and not everything that is stated therein constitutes a precedent. It is, therefore, pertinent to keep these principles in mind while dealing with the decision of the Supreme Court relied upon by the learned counsel for the landlord.

15. Learned counsel for the landlord sought to rely upon a decision of the Supreme Court in the case of M/s Mahabir Cold Storage Vs. C.I.T. Patna, reported at AIR 1991 SC 1357. Learned counsel for the landlord sought to rely upon the observations made in paragraphs 10, 11 and 12 of the said decision to support his contention that a reconstituted firm has a separate and distinct identity, and that therefore the rights available to the old firm were not necessarily transferable to the new firm. In this context a plain reading of the said decision indicates that the Supreme Court was considering the question of development rebate available under section 33 of the Income-tax Act, 1961, and it was in this context that the Supreme Court had occasion to hold that the reconstituted firm (the new firm) being an assessee before the Income-tax authorities, was not entitled to the development rebate under section 33(1) inasmuch as the assessee new firm was a new identity under the Act, and that it was not a successor in interest of the old

firm as per the provisions of the Act. Only the successor in interest of the business, in accordance with the provisions of the Act, so long as the twin requirements under section 33(1) were fulfilled was alone entitled to the benefit. But when the unit of the ownership and use of the asset in the business was disrupted or a branch of an earlier business was taken over by a new firm which existed simultaneously with the other branches of the old business, the benefit of development rebate under section 33(1) did not extend to either firm. It is, therefore, clear that the observations of the Supreme Court in the said decision pertains specifically to the applicability and availability of the development rebate in the context of section 33(1) of the Income-tax Act, and the observations are made in the context that only the successor in interest of the business would be entitled to the benefit. These observations, in my opinion, do not in any manner assist the learned counsel for the landlord to further his contention that on every reconstitution of a partnership firm, there is a separate and distinct legal entity created, and that the rights or assets (including an asset in the nature of a tenancy right) are not ipso facto or by contract transferred to the successor firm.

16. Learned counsel for the landlord then sought to rely upon a decision of the Supreme Court in the case of Her Highness Maharani Mandalsa Devi Vs. M. Ramnarain Private Ltd., reported at 1968 Bombay Law Reporter, 31. Learned counsel for the landlord has chosen to cull out from this entire decision only part of a sentence to rely upon, where it is observed that the firm is not a legal entity and that the persons who are individually called partners are collectively called a firm, and the name under which their business is carried on is called the firm name.

16.1 It must be distinctly understood that the said decision is in the context of Order 30 and particularly Order 21, Rule 50 of the CPC, where a decree which is passed against a partnership amounts to decree against all the partners of a firm. It was in this context that the Supreme Court observed that the legal fiction contained in Order 30 of CPC permits a firm to sue or be sued in the name of the firm "as if it were a corporate body. But the legal fiction must not be carried too far. For some purposes the law has extended a limited personality to a firm, but the firm is not a legal entity. The persons who are individually called partners are collectively called a firm, and the name under which their business is carried on is called the firm name. A

suit by or in the name of a firm is thus really a suit by or in the name of all its partners. So also a suit against the firm is really a suit against all the partners of the firm. The conclusion drawn by the Supreme Court in the said decision on the basis of the said observation is that ultimately the decree passed in the suit, though in the form against the firm, is in effect a decree against all the partners. Learned counsel for the landlord while omitting to consider the purpose of the discussion in the said decision only seeks to emphasis the casual observation to the effect that the firm is not a legal entity and/or that when a firm is not a tenant, the tenancy is not really in the name of the legal entity, but that such tenancy is a joint tenancy created in favour of all the partners of the said firm. Consequently it is contended that such joint tenancy created in favour of the then partners cannot possibly survive even the first reconstitution of the firm. What the learned counsel for the landlord is unable to face or explain, is that if this hypothesis were to be accepted, the tenancy which was originally created in the name of the firm through the four existing partners at that point of time (say A, B, C, and D) would be a tenancy which would cease to exist the moment any one of the four left the firm. Obviously this hypothesis would not stand the scrutiny if we accept it at its face value in the light of the necessary consequence which flows from one partner walking out of the partnership. Suppose out of four A,B,C and D, D walks out and is replaced by E, if the hypothesis as presented was acceptable, it would then follow that if the original tenancy was merely in the name of the firm, but in reality was a joint tenancy in the names of A, B, C and D, the fact that D walked out of the partnership firm would make no difference, and the joint tenancy between A, B, C and D would continue to exist as a joint tenancy between four individuals, irrespective of whether D remained as a partner or not. Such a conclusion is an absurdity which demonstrates the fallacy of the submission.

17. Learned counsel for the landlord also sought to rely upon a decision of the Supreme Court in the case of Malabar Fisheries C. Vs. I.T. Commissioner, Kerala, reported at AIR 1980 SC 176. Learned counsel seeks to place reliance upon the observations in the said decision at para 13, which reads as under:

> "13. It is well known that commercial men and accountants on the one hand and lawyers on the other have different notions respecting the nature of the firm and this difference between

the mercantile view and the legal view has been explained in Lindley on Partnership 12th Edn. at pp.27 and 28 thus:

`Partners are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation i.e as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to or creditors of the firm.

Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the firm is considered as continuing the same, and the rights and obligations of the old firm are regarded as continuing in favour of or against the new firm as if no changes had occurred. The partners are the agents and sureties of the firm; its agent for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

But this is not the legal notion of a firm.The firm is not recognised by English lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, Courts have to some extent adopted the mercantile view, and actions may now, speaking generally, be brought by or against partners in the name of their firm; but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any

change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be a debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer.'" (Emphasis supplied)

17.1 However, it must be noted that in paragraph 16 of the same decision the Supreme Court has drawn a distinction between the Indian concept of a partnership as against the concept under English law and the Scottish law. In this context the Supreme Court had occasion to observe as under:

"Before the Board it was argued that under the Indian Partnership Act, 1932, a firm is recognised as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues.The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession." (Emphasis supplied).

17.2 However, the pertinent observations of the Supreme Court are contained in paragraph 18 of the said decision. The sum and substance of the said decision is that the partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. The Supreme Court then observed in para 18 that if that "be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the

partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of section 2(47) of the Act". Thus, the crux of the matter which was required to be decided by the Supreme Court in that decision, and in fact the question decided is, whether a partnership firm is such a legal entity, apart from its partners, so as to confer upon the firm a right of its own in the partnership assets. It was in this limited context that the Supreme Court had made the observations in paragraphs 13 and 16, sought to be relied upon by the learned counsel for the landlord.

18. A similar view in parallel circumstances has been expressed by this court in the case of Jagjivanbhai Vs. Mukundlal, reported at AIR 1987 Gujarat 230 to the effect that where the original letting was for the business run as a joint family business and the rent was being paid out of the funds of the joint family business, there cannot be any question of subletting amongst the members of the joint family or persons carrying on the business jointly.

19. In the premises aforesaid, I am not inclined to accept the submission of the learned counsel for the landlord to the effect that a partnership firm is incapable of having an independent legal existence so as to have a tenancy in its own right as a legal entity, and that a tenancy in favour of a firm must be deemed to be a joint tenancy in favour of only the then existing partners.

20. Even otherwise, on the facts of the case, when the fundamental principles pertaining to the creation of a sub-tenancy are sought to be applied, it must be held that an illegal sub-tenancy can only be created by transfer of exclusive possession by the original tenant to any person or legal entity who is someone other than the original tenant. Here, on the facts of the case, it is neither pleaded nor proved by the landlord that the partnership firm has ever parted with its own possession since the tenancy was created. In fact it is common ground that the firm is still doing business on the

leased premises (although in the form of a reconstituted firm). Further it is pertinent to note that even defendant no.2 is not alleged to be an illegal sub-tenant on the ground that he is an outsider or third party qua the partnership firm. To add to the problems of the landlord, it is not even attempted to be explained as to why the second defendant is chosen to be branded as "illegal sub-tenant" while ignoring all the fresh partners who are in the same position as that of the second defendant.

20.1 In this limited context it must also be observed that although the second defendant is alleged to be an illegal sub-tenant, there is neither an averment nor any proof or evidence that the second defendant was placed in exclusive possession or held exclusive possession of the suit premises, whether on his own account or even on account of the reconstituted firm.

21. In the premises aforesaid I am constrained to hold that the entire basis and premise upon which the judgement of the lower appellate court is based is fallacious, illegal and bad in law and consequently it is required to be quashed and set aside. It is accordingly so held and directed.

22. This revision is accordingly allowed. Rule is made absolute with no order as to costs. Interim relief stands vacated.

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